from suing the other unless he prosecutes it to final judgment against one.[3]

The courts appeal in these cases to the doctrine of election of remedies, which requires that wherever, for the same cause of action, a plaintiff is given two methods of redress based upon inconsistent theories, he be compelled to elect one and waive the other.[4] In designating judgment as the point at which election takes place they have, however, made a faulty application of the principle. Whether a person has made an election is a question of fact. By reason and by authority in other lines of cases, such an unequivocal act as commencing suit would seem to be conclusive proof of a binding election.[5] Moreover, if a plaintiff's act in prosecuting a suit to within a step of judgment is not an election, it is difficult to see how the act of the court in pronouncing judgment can be more decisive. It is submitted, therefore, that these cases may be reconciled on the ground that the courts while professedly applying the doctrine of election have gone upon a theory of merger, namely, that the plaintiff has but one right of action which he may pursue against either principal or agent until it is drowned in a judgment.[6]

The doctrine of election of remedies, however, seems to have been correctly applied in a case recently decided by the United States Circuit Court of Appeals for the District of Indiana. *Barrel* v. *Newby*, 36 Chic. Legal News 172. The defendant, when sued as after discovered principal, pleaded that the plaintiffs, with full knowledge of the facts, had begun and were continuing a suit at law against the agent. The court, holding that by the suit against the agent the plaintiff had made his election, overruled a demurrer to the plea. The case is extremely interesting since it is probably the first which has reached this result. Yet it is a logical consequence, if the doctrine of election is to apply.

Whether the plaintiff should on principle be put to his election, is a question somewhat in dispute. At least one jurisdiction has held that inasmuch as the agent is originally bound by the contract he can never be released until the obligation is discharged.[7] Some cases have even suggested the analogy of joint tort-feasors. On the other hand, it is impossible, as a matter of truth, to say that the contract was made upon the joint responsibility of agent and principal, for the plaintiff entered into it with no expectation of charging any one but the agent. Furthermore, when he sues one party as solely responsible, he negatives the liability of the other. Granting the correctness of the rule which gives such a plaintiff a direct right of action against either principal or agent, it would seem that the decision is correct in compelling him to elect.

RESTRICTIVE AGREEMENTS AS TO CHATTELS. — The modern tendency towards monopoly has found expression in attempts by manufacturers to maintain minimum retail prices for the sale of their goods. The manufacturer may effectively bind the wholesaler by a direct restrictive agreement; and an attempt is now frequently made to affect likewise the retailer by affixing printed labels to the goods, thereby charging all subsequent transferees with notice of the conditions under which they were originally

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[3] Sessions *v.* Block, 40 Mo. App. 569.
[4] See Thompson *v.* Howard, 31 Mich. 309, 312.
[5] Moller *v.* Tuska, 87 N. Y. 166.
[6] See 2 Bl. on Judg. § 674.
[7] Beymer *v.* Bonsall, 79 Pa. St. 298.

sold. Whether the person into whose hands the goods may come is in equity bound by such restrictions is an unsettled question. In two New York cases[1] — the only authority that has been found — restrictive agreements as to chattels were held binding upon third parties who took with notice. This is in effect an extension to chattels of the so-called doctrine of equitable easements by which covenants restricting the use of land are enforced against purchasers with notice.[2] A recent English case is interesting since it refused to enforce against a retailer certain restrictions contained in labels attached to boxes of tobacco. *Taddy & Co.* v. *Sterious & Co.*, 20 T. L. R. 102 (Eng., Ch. D.). It is to be regretted that the court gives no reasons for its decision on this point, but in the absence of any special facts to distinguish the case, the bald statement of the court "that conditions of this kind did not run with the goods and could not be imposed on them" may fairly be taken as opposed to the New York decisions.

Whether courts of equity are justified in extending this doctrine to chattels must depend upon the real ground on which restrictive covenants are held to run with land. If, according to the view adopted by some American courts,[3] such restrictions are enforced on the analogy of common law easements, the doctrine is of course wholly inapplicable to chattels. But this analogy is a superficial one.[4] The purchaser's liability in this class of cases is based on the broad equitable principle that wherever equity, as against an original promisor, would have enforced specific performance of an agreement, it will, as against a purchaser with notice, or a volunteer, raise a constructive obligation subjecting him to the terms of that agreement. The purchaser of such land is in the same position as a purchaser from a defaulting trustee, or from an owner of land who had previously contracted to sell it to another. In all these cases, if no relief is given, the original promisee is unjustly impoverished, while the purchaser who takes with notice or without giving value is correspondingly enriched. Given, then, a restrictive agreement as to chattels, of such a nature as to call for specific performance, and there is nothing in the nature of things to prevent it from running with those chattels.

Restrictive agreements between manufacturers and wholesalers, as, for example, the one involved in the recent English case, fall within the rule. Such agreements are not in restraint of trade;[5] consequently the manufacturer, owing to the inadequacy of his damages at law, would be entitled to a decree of specific performance as against the wholesaler. He is likewise entitled to relief against a retailer who takes with notice, unless, as is sometimes suggested, it would be inexpedient for equity to grant such relief. The manufacturer, however, being engaged in private business, is under no legal duty to place his goods on the market. If he chooses to do so, according to modern individualistic notions his right to name the conditions under which those goods shall be sold is absolute; and, so far as the interests of the public are concerned, there can be no more objection to the enforcement of that right against a third party than against the original promisor.

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1 New York Bank Note Co. *v.* Hamilton, etc., Co., 28 N. Y. App. Div. 411; Murphy *v.* Christian Press, etc, Co., 38 *ibid.* 426.

2 Tulk *v.* Moxhay, 2 Ph. 774.

3 Trustees of Columbia College *v.* Lynch, 70 N. Y. 440.

4 See 5 HARV. L. REV. 274, 276.

5 Elliman, Sons & Co. *v.* Carrington & Son, Ltd., [1901] 2 Ch. 275; see Heaton-Peninsular, etc., Co. *v.* Eureka Specialty Co., 77 Fed. Rep. 288.